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IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This reply to respondents' brief is submitted in accordance with leave granted at the oral argument.

Inevitably in an answering brief more than twice the length of ours in which respondents have attacked our case

from every possible position, the original lines of that case have been obscured. We shall first, therefore, seek to separate out and re-state the precise questions raised here, and thereafter deal in order with respondents' various contentions.

1. Essence of Petitioners' Case.

It may be of service at the outset to re-state, without elaboration, the simple propositions upon which we rely in this Court: If this case be assumed to be one of purely equitable cognizance, the Federal equity courts, which before the decision in *Erie R. R. Co.* v. *Tompkins* acted in *obedience* to the statute of limitations as at law only in cases of concurrent jurisdiction and in cases of purely equitable cognizance followed the statute of limitations only by *analogy* upon the basis of substantive equitable considerations, are now constrained to act in *obedience* to the statute of limitations of the State where the equity jurisprudence of the State is to that effect. But in any event this case is not one of purely equitable cognizance but rather one of concurrent jurisdiction, *i.e.* one for the enforcement of a purely legal right or cause of action, with respect to which equity has historically applied the statute of limitations as at law.

2. The Issues Analyzed.

From a comparison of respondents' brief with ours, it will be clear that the points at issue, in their respective bearing, are as follows:

(a) Is the application of the equitable doctrine of laches by the lower courts herein, in a manner concededly

not justified by the law of New York on the subject, contrary to the rule laid down by this court in *Erie R. R. Co.* v. *Tompkins* and *Ruhlin* v. *New York Life Insurance Co.*? We maintain that it is. But this issue is not necessarily decisive of the appeal. Should the Court agree with us on this issue, there remains the question raised by respondents whether the New York courts would apply the three- or the ten-year statute of limitations, viz. (b) below. Should the Court agree with the respondents on this point, it can still reverse the decree and apply the three-year statute as a law statute of limitations if convinced that jurisdiction at law and in equity is here concurrent, viz. (c) below.

(b). Does the New York three-year statute bar an action of purely equitable cognizance? If so, and if in addition this Court will follow the New York law with respect to the doctrine of laches, then the decree below must be reversed. If not, the decree will also be reversed should the Court be convinced that this is not an action of purely equitable cognizance, viz. (c) below.

(c) Is this case one of concurrent jurisdiction at law and in equity; viz. (as respondents would put it) one where the remedy at law is adequate, or (as we would put it) one where the cause of action or claim or demand asserted is wholly of a legal character? If so, then the decree below is concededly erroneous regardless what may be this Court's determination on (a) and (b) above. On this aspect of the case, accurate thinking with respect to the history and practice of equitable remedies requires a careful discrimination between the *form* of the remedy and the *substance* of the right protected by the remedy.

3. Confusion in Respondents' Brief.

The correct determination of the issues so presented, in so far as may be necessary for decision of the case, is of importance to the proper demarcation of Federal and State law, under the *Erie* doctrine. Respondents' brief, however, seems to us to introduce great confusion into the solution of these questions by the employment of terms in different senses.

Thus the words "common law" are used at page 14 and elsewhere of respondents' brief with the implication that they exclude equity jurisprudence; are used at page 36 to include liability imposed in equity; and are again used at pages 16 and 18 by reference in the sense of Federal decisional law adjudicating relations between the States, more properly the "international law" of the Federal system.[1] Again, respondents say (p. 3) that the question here involved is one of "determining the liability created by Federal statute" and imply (p. 18) that this case necessarily involves "the interpretation and application of the United States Constitution or an Act of Congress"; whereas in fact the only question involved is the principle to be applied in barring *enforcement* of the liability under the Act of Congress. Consistently throughout their brief respondents employ the word "remedy", particularly in connection with the concept of adequate remedy at law, as if it denoted the mere form of the action or proceeding, whereas we shall show below[2] that the conception of remedy in the New

[1] *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U. S. 92, 110, and authorities there cited. *Kansas* v. *Colorado*, 206 U. S. 46, 97, makes clear that the conception involved is one of international law.

[2] See at pp. 33-7, 44 hereof.

York decisions on the statute of limitations and in general equity jurisprudence is bound up with the entirety of the cause of action and the substance of the claim.

4. As to the Rule of the *Erie* and *Ruhlin* cases.

Respondents raise a number of objections to our argument that the doctrine of the *Erie* and *Ruhlin* cases requires the Federal courts in New York to apply laches in the same manner and on the same principles as do the State courts. These objections will be dealt with in order.

(a) Laches as a substantive law doctrine.

Fundamental to our contention on this point is the proposition that laches is at least as much a matter of substantive law as was the Texas rule of burden of proof as to *bona fide* purchase for value in *Cities Service Oil Co.* v. *Dunlap*, No. 28 at this term of Court, decided December 4, 1939. At pages 18-19 of our main brief we set forth some of the authorities showing the essentially substantive nature of the rule of laches as applied in the equity jurisprudence of this Court. Respondents admit (brief, p. 25) that no authority has been found indicating that the doctrine of laches in equity is procedural. While it was perhaps not to be expected that they any more than we could find a precedent specifically denominating laches as either substantive law or procedure[3], respondents have directed attention to

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[3]As Mr. Justice Reed remarked in the *Erie* case, 304 U. S. at 92, the line between procedural and substantive law is hazy. Cf. note 1938 Columbia Law Review page 1472. Despite the number of decisions in New York construing the statute

no authorities in any way contrary to those which we have cited (brief, pp. 18-19) showing the substantive nature of the doctrine. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 490 (cited by respondents at pp. 27-8 in another connection) further emphasizes the substantive law elements in laches, *i.e.*, considerations of due diligence by complainant and prejudice to defendants.

Undeterred by the absence of authority, respondents would exclude laches from the *Erie* rule with the argument that it "is necessarily a doctrine of remedy and not one affirmatively creating a substantive right" (brief, p. 25). Such phrases are a source of sophistry. While laches, being a defense, may possibly be said not "affirmatively" to create a right, it is undeniable that the right generated by laches is a substantive right, since it is adequate to defeat a substantive right in the other party. *Menendez* v. *Holt*, 128 U. S. 514, 523. Whether laches is a doctrine of remedy or something more depends upon whether the word "remedy" be confined to the procedural machinery employed to enforce a right independently conceived or be used in a broader sense to embrace also the right secured to the suitor by a particular process.[4] The attempt to get an accurate definition of "remedy" by collating the prece-

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of limitations, none of which we are aware has denominated it as procedural rather than substantive; a few, e.g. *Robinson* v. *Robins Dry Dock Co.*, 238 N. Y. 271, 276, have implied that it was substantive.

[4]Thus in an action by a legatee who is also an executor to enforce a trust established for the benefit of legatees by the will, the equitable procedure of accounting not only enforces plaintiff's right but is an integral part of it, since a suit at law would not lie by plaintiff against herself. *Rundle* v. *Allison*, 34 N. Y. 180, 183.

dents is as unnecessary for present purposes as it would be unprofitable in view of the frequent broad use of the word by the courts. It suffices here to point out that respondents cannot disprove the substantive character of laches by the application thereto of the ambiguous word "remedy", and that the use of this word does not authorize the description of laches by respondents as "procedural law" (p. 16) or as "the limitation" constituted by equity for their cause of action (pp. 19-20).

(b) Historic equity jurisdiction not here involved.

Respondents' argument to the effect that the application of the *Erie* and *Ruhlin* doctrine so as to eliminate laches from this case in accordance with New York law would diminish the Federal equity jurisdiction as conferred by the Constitution, Art. III, § 2, Cl. 1, and by statute, 28 U. S. C. §§ 41 (1), 384, 723, R. S. §§ 563, 629, 723, 913, rests upon an ambiguous use of the word "jurisdiction". It may be conceded that, upon our contention, the act of a State legislature abolishing an entire head of equity jurisdiction would raise a serious question not raised in this case, and might possibly not be effective with respect to Federal courts in that State, even in cases based upon diversity of citizenship only. Thus State legislation creating an adequate remedy at law might not, despite the *Erie* and *Ruhlin* doctrine, deprive Federal equity of its historic jurisdiction over creditors' bills to subject transferred property of the debtor to the payment of judgments: *Mississippi Mills* v. *Cohn*, 150 U. S. 202. So likewise, to answer the question addressed by Mr. Justice Stone to respondents' counsel on the oral argument, the legislation of a State

abolishing the entirety of its equity jurisprudence, might well be held ineffective with respect to the Federal equity jurisdiction.

The ground of the conclusion in the two instances supposed, which deprives of any relevance here arguments addressed to the historic Federal equity jurisdiction, would be that the powers intended to be conferred by the Constitution upon the Federal courts were those powers which were historically exercised by the English courts of chancery and of common law in 1789, together with the residual power which belongs to a court by its very nature and which permits the indefinite modification and development of the body of doctrine so received. Properly understood, this principle has nothing to do with the *manner* in which the powers possessed by the Federal courts shall be exercised. It has nothing to do with the rules or principles of decision to be followed by the Federal courts, either at common law or in equity, *within the circumference* of the jurisdiction given by the Constitution and by statute.

The Rules of Decision Act, 28 U. S. C. § 725, established the laws of the several States as rules of decision in trials at common law in the Federal courts; yet it is not contended by the respondents that by this clause of the Judiciary Act of 1789 Congress deprived the Federal courts of their historic common law jurisdiction in any part. The decision in the *Erie* case, construing this statute to embrace also the common law of the respective States, is not contended by the respondents to have diminished the common law jurisdiction of the Federal courts. No reason whatever appears, none is suggested by the respondents, why exactly the same considerations should not apply to the equity juris-

prudence[5] of the States as to their common law jurisprudence. If the application in Federal common law cases of the substantive law of the States is not a diminution of the common law jurisdiction conferred on the Federal courts by the Constitution, no more is the application in the Federal equity courts of the State substantive law. The Rules of Decision Act itself did not make the difference, because as a matter of principle the laws (including decisions) of the several states, in equity as well as at law, should be applied in the Federal courts in so far as the Constitution, treaties or statutes of the United States do not otherwise require or provide. *Ruhlin* v. *New York Life Insurance Co.* 304 U. S. 202, 205; *Mason* v. *United States,* 260 U. S. 545, 559; *The Bank of Hamilton* v. *Dudley's lessee,* 2 Pet. 492, 525.[6]

The authorities cited by respondents in connection with this point in no way assist their reasoning. All of them have to do with practice in the equity courts, not with substantive law. In *Robinson* v. *Campbell,* 3 Wheat. 212, 221-3, the Court held that pleading of equitable title as a defense

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[5]"Jurisprudence" is here used in distinction to "jurisdiction", as indicating the content of the law developed by the courts within the boundary of their powers as drawn by their jurisdiction, although this distinction is not observed by respondents (brief p. 11). A good discussion of the distinction appears in *Venner* v. *Great Northern R. Co.,* 153 Fed. 408, 415, Ray, *D. J.*, affirmed on other grounds 209 U. S. 24. See also the language of Pomeroy, Equity Jurisprudence (4th Ed.) § 131.

[6]Respondents seek to differentiate the *Mason* case on the ground (brief p. 44) that the action was local. In *The Bank of Hamilton* case the statute applied was a rule of property, but in neither case did the Court predicate its conclusion upon that fact; and in the *Ruhlin* case the cause of action was not local.

in an action of ejectment, although arguably permissible under the State law, could not be permitted in a Federal law court. In *Boyle* v. *Zacharie*, 6 Pet. 648, 657 the Court held that an injunction obtained under a Maryland statute which gave such injunctions the effect of a supersedeas at law, would not be so applied in a Federal law court. In *Payne* v. *Hook*, 7 Wall. 425, 430, the decision was that a Federal court in Missouri could entertain a bill for an accounting and other relief against a public administrator notwithstanding a Maryland statute conferring exclusive jurisdiction over the accounts of administrators on the local probate court. *United States* v. *Howland*, 4 Wheat. 108, 115, held merely that a creditor's bill would lie in the Federal court notwithstanding a State statute permitting an action at law. *Mississippi Mills* v. *Cohn*, 150 U. S. 202 is to the like effect. In *Michaelson* v. *United States*, 266 U. S. 42, 63-5 it was questioned whether the provision in the Clayton Act for a jury trial for contempt of an injunction was an encroachment upon the equity jurisdiction intended by the Constitution, and the statute was sustained. In *Matthews* v. *Rodgers*, 284 U. S. 521, the Court reversed the action of a statutory court enjoining the collection of a State tax, upon the ground that an adequate remedy was provided by the State law, and said at page 529 that in any event a State statute cannot affect the jurisdiction of Federal courts of equity. In *Gordon* v. *Washington*, 295 U. S. 30, the Court directed dismissal of bills of complaint requesting the appointment of receivers of trust funds administered by a State officer, and at page 36 referred to the historic powers of Federal courts of equity.

Plainly these cases are confined to preserving Federal equity practice from procedural innovations not made by

Congress, and do not deal with *principles of decision* in equity, such as laches.

Pusey & Jones Co. v. *Hanssen,* 261 U. S. 491 (respondents' brief, p. 25) held that the jurisdiction of a Federal equity court could not be enlarged by a State statute authorizing the appointment of a receiver at the suit of a simple contract creditor. The opinion of Brandeis, *J.* pointed out that the right conferred could have been enforced in the Federal courts if it were a new substantive right but that the statute conferred merely a remedy (pp. 498-9). He thus differentiated the cases in which the Federal equity courts had enforced, within the framework of their own practice, new substantive rights created by State law. See *Louisville & Nashville R. Co.* v. *Western Union Telegraph Co.,* 234 U. S. 369; *Scott* v. *Neely,* 140 U. S. 106, 109 (dictum); *Clark* v. *Smith,* 13 Pet. 195; *Broderick's Will,* 21 Wall. 503; *Holland* v. *Challen,* 110 U. S. 15. While three of these involved title to land in the State, that fact is not made a ground of distinction by the Court and the principle applied is that stated in *Case of Broderick's Will,* 21 Wall. 503, which was an action to set aside the probate of a will (p. 520):

> "Whilst it is true that alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the State. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

So in *Ex parte McNiel*, 13 Wall. 236, where on an application for a writ of prohibition this Court applied the pilotage law of New York, it was said (p. 243):

> "It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal court; but that is not a question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Cates v. *Allen*, 149 U. S. 451, also relied upon by respondents, is like *Scott* v. *Neely* and *Pusey & Jones Co.* v. *Hanssen* in holding that a State statute authorizing a creditor's bill at the suit of a simple contract creditor enlarged the jurisdiction by adding a new remedy, and could not be enforced in a Federal court.

From these and other cases[7] it is perfectly apparent that the rule invoked by respondents relates only to the scope of

[7] See also *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 43.

the powers constituting the historic jurisdiction of the Federal courts and in no way touches the question involved here. It is true that one or two of the cases cited by respondents contain dicta which might be thought to support their interpretation. Thus in *Burrill* v. *Locomobile Company*, 258 U. S. 34, 38, Holmes, *J.* says:

> "Congress acting under the Constitution has given to the courts of the United States a jurisdiction in equity that, speaking broadly, is the same in all the States and follows its own rules."

The bulk of this sentence is but another statement of the Constitutional basis of Federal equity jurisdiction, but the last five words might be deemed a paraphrase of the rule in *Swift* v. *Tyson* of which Mr. Justice Holmes disapproved and which he was instrumental in overthrowing. *Guffey* v. *Smith*, 237 U. S. 101, 114, also goes further than the other cases cited by respondents in declining to follow, in an equity action to enjoin operations under a lease of oil and gas lands and to obtain an accounting, decisions of the State courts holding that the presence of a surrender clause in the lease deprived it of mutuality and remitted the lessee to his remedy at law. This Court treated the State decisions as eliminating a standard head of equity jurisdiction.* While the result might possibly be defended under the principle of the *Ruhlin* case, some of the reasoning is too broad to stand by that test, as indicated by the language which the Court quoted with approval from *Neves* v. *Scott*, 13 How. 268, 272:

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*Cf. *Dodge* v. *Tulleys*, 144 U. S. 451, 457 (State statute eliminating attorney's fees).

> "Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto."*

The extent of the principle represented by the authorities which respondents cite is marked out by the language of this Court in *Matthews* v. *Rodgers*, 284 U. S. 521, 529:

> "The equity jurisdiction conferred on inferior courts of the United States by §11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by §24 of the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. *Payne* v. *Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies; nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate. *Henrietta Mills* v. *Rutherford County*, *supra*, pp. 127, 128; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500."

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*This is the same conception of a general Federal law of equity which, analogous to the conception of a general Federal common law, is found in *Kirby* v. *Lake Shore &c. R. R.*, 120 U. S. 130. See our main brief at page 23.

Of course the mere statement of this principle differentiates it from the question here as to *what shall be deemed a bar* in the exercise of Federal equity power, and reduces to ridicule respondents' fear of an astounding change in or the "complete destruction" of the Federal equity jurisdiction (brief p. 16), to come from our solution of that question.[10]

The distinction between the historic equity jurisdiction and the rules or principles by which that jurisdiction shall be exercised, is pointed by *Mason* v. *United States*, 260 U. S. 545, in which the State law with respect to damages for the occupation of land, was applied in an equity action brought by the United States for a confirmation of title. At page 557 this Court said:

> "But while the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation, the rights involved therein may be the proper subject of such legislation. See *Missouri, Kansas & Texas Trust Co.* v. *Krumseig*, 172 U. S. 351, 358."

This Court then quoted with approval the following language of the Fourth Circuit Court of Appeals in *Independent District of Pella* v. *Beard*, 83 Fed. 5, 13:

> "It is undoubtedly true that the United States courts sitting as courts of equity have a freedom of action in this respect which they do not possess as

[10] **The preceding discussion will also dispose of the assertion (respondents' brief p. 12) that the Federal equity jurisdiction prior to *Swift* v. *Tyson* was more independent than the common law jurisdiction. The three cases cited by respondents on this point, although containing dicta which fail to distinguish between "jurisdiction" and "rule of decision", do not in reality so determine. Only one of them, namely, *U. S.* v. *Howland*, 4 Wheat. 108, was in equity, and that dealt with a rule of practice only.**

> courts of common law, and that, as a general proposition, the equity jurisdiction of the federal courts cannot be limited or restrained by a state. *Green* v. *Creighton*, 23 How. 90; *Payne* v. *Hook*, 7 Wall. 430; *Ridings* v. *Johnson*, 128 U. S. 212; *Mississippi Mills* v. *Cohn*, 150 U. S. 202. But these decisions relate to the practice, the impairing of jurisdiction, rather than to the determination of the rights of parties after jurisdiction has been acquired."

The Court then pointed out that the State statute and decisions had nothing to do with the general principle of equity or with the Federal equity jurisdiction, but simply established a measure of damages applicable alike to actions at law and suits in equity, and that the enforcement of such a statute in equity in no manner trammels or impairs the equity jurisdiction of the national courts. So the New York statute of limitations, while it does affect a rule of decision in equity with respect to the lapse of time as a defense, in no way trammels or impairs the Federal equity jurisdiction, does not diminish it, but merely affects the manner of the exercise of that jurisdiction: the period of limitations at law, theretofore followed by analogy, is now to be followed as an exact measure.

Respondents controvert our statement (main brief, p. 23) that *Kirby* v. *Lake Shore, etc. R. R. Co.*, 120 U. S. 130 appears to be the only case in which this Court has applied the doctrine that equity is not bound by the State statute of limitations. They refer to *Southern Pacific R. R. Co.* v. *Bogert*, 250 U. S. 483, with the implication that that is another decision of the same kind (brief, p. 27). There this Court did indeed, applying the rule of laches, hold that a delay of 22 years was excusable. The present

question, however, was in no way involved and could not have arisen. Not only was the statute of limitations not pleaded (respondents' brief, p. 27); it was not argued by defendants in this Court, and could not have been argued because it never began to run. As is pointed out by Judge Hand in *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630, 632, Southern Pacific Co. was a foreign corporation not doing business in New York, had never designated an agent for the service of process in New York, and could not therefore invoke the New York statute of limitations. *Comey* v. *United Surety Co.*, 217 N. Y. 268.

If the equity doctrine of laches be, as we have shown, a doctrine of substantive law, then its enforcement in a Federal equity court in New York must be in accordance with the statutes and decisions of New York, and precedents to the contrary, if there were any, have been overruled by the *Erie* and *Ruhlin* cases, which reversed the whole current of authority stemming from *Swift* v. *Tyson*. The cases in this Court subsequent to those decisions do not in any way modify them. *Sprague* v. *Ticonic National Bank*, 83 L. Ed. 771 concerns merely procedure in the District Court on the allowance of costs. *Atlas Life Insurance Co.* v. *Southern*, 83 L. Ed. 755, 758 re-states the historical and Constitutional basis of the Federal equity jurisdiction.

Two decisions of this Court anterior to the *Erie* and *Ruhlin* cases, illustrate our contention with respect to the application of the new rule to the question here. *Dupree* v. *Mansur*, 214 U. S. 161; *Missouri K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 351. The first was a bill to quiet title to land in Texas. The question arose on a cross-bill to foreclose a vendor's lien and mortgage on the same lands.

The law of Texas barred an action upon a debt upon civil contract in four years, and by the same length of time under the Texas decisions the right to foreclose the lien was also barred. The argument made in this Court against the application of the Texas law was strikingly similar to the argument of respondents here. In the words of Mr. Justice Holmes (214 U. S. at 166),

> "The respondent argues that the vendor's lien is equitable; that the statute of limitations does not govern equitable proceedings, and that a court of equity will not be governed by the analogy of the statute unless it seems equitable to follow it; that the equity jurisdiction of the United States is not to be affected by state laws; that therefore the United States courts are unincumbered by the Texas decisions, and that they ought to say that it is inequitable to deny a remedy on the security when a suit is barred upon the debt. We will not consider in how many points we disagree with this argument, but will confine ourselves to what we deem a sufficient answer."

In rejecting this argument Mr. Justice Holmes pointed out that the right barred by Texas law was itself a creation of that law (thus indeed differing from the right involved in the instant case, which is a creation of Federal law), and rested his decision principally upon this fact. But it is plain from the language above quoted that his disagreement went to the whole length of the argument advanced, although he confined himself to the narrow answer. He added at page 167:

> "We should add as an independent consideration that it cannot be admitted for a moment that for

> a debtor to rely upon the statute of limitations is inequitable of itself without some special circumstance wanting here. That would be for courts, and in this case courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the State, had declared right."

Such reasoning strikes out the whole substantive content of laches as applied in the instant case.

In *Missouri K. & T. Trust Co.* v. *Krumseig,* a borrower had brought suit in equity in the State court for the cancellation of a contract made usurious by the State law, which further provided that in such circumstances the contract might be cancelled without the return of property or value received. The action was removed to the Federal court. The general principle in equity, as recognized by this Court (172 U. S. at 357), is that relief will not be given to the borrower against an executory contract except on condition of the return of value received. The argument advanced against application of the State statute was like the argument of respondents here (p. 358):

> "But it is strenuously argued, and of that opinion was Circuit Judge Sanborn in the present case, that Federal courts, in the exercise of their equity jurisdiction, do not receive any modification from the legislation of the States or the practice of their courts having similar powers, and that consequently no act of the legislature of Minnesota could deprive the Federal courts sitting in equity of the power or relieve them of the duty to enforce and apply the established principle of equity jurisprudence to this case that he who seeks equity must do equity . . .".

This argument was rejected by this Court with the holding that the local statute concerned a substantive right of which complainant could not be deprived by removal to the Federal court. At pages 358-9 the Court said:

> "With the policy of the state legislation the Federal courts have nothing to do. If the States, whether New York, Arkansas, Minnesota or others, think that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the courts, such a view of public policy, in respect to contracts made within the State and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law. The local law, consisting of the applicable statutes as construed by the Supreme Court of the State, furnishes the rule of decision."

In itself, apart from the danger of confusion with the rule as to the basis of the Federal equity jurisdiction which is the real subject matter of respondents' authorities, their contention on this point would not be worthy of prolonged consideration. The modification by State statute of an equity rule of decision affecting laches can not conceivably affect the scope or the limits of the Federal equity jurisdiction. The sole extent of the change here involved is that courts theretofore merely guided by State periods of limitations[11] are now bound by them in the manner and to the extent that the State courts are bound.

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[11] *Benedict* v. *City of New York*, 250 U. S. 321, 327.

(c) Diversity of citizenship as a restriction on *Erie* and *Ruhlin* doctrine.

The further contention is made that the doctrine of the *Erie* and *Ruhlin* decisions is limited to cases in which jurisdiction arises from diversity of citizenship (respondents' brief, pp. 14, 15, 19). The instant case arises under a law of the United States, although diversity of citizenship is also set up in the bill as a ground of jurisdiction (R. 4). But nothing appears in the language, decision or basis of the *Erie* and *Ruhlin* cases to warrant the attempted restriction of their doctrine to cases arising from diversity of citizenship. When Mr. Justice Brandeis in the *Erie* case stated the purpose of the Rules of Decision Act, § 34 of the Judiciary Act of 1789, 28 U. S. Code § 725, as stating rules of decision for "the Federal courts exercising jurisdiction in diversity of citizenship cases" (304 U. S. at 73), he was merely using a verbal shorthand for the language of the statute itself, ". . . except where the Constitution, treaties, or statutes of the United States otherwise require or provide . . .". This is apparent from his own language, "except those in which some Federal law is controlling" (p. 72); "except in matters governed by the Federal Constitution or by Acts of Congress" (p. 78). It is also apparent from the face of the statute, which prescribes the laws of the States, not as rules of decision in cases arising from diversity of citizenship, but as rules of decision "in the courts of the United States."

There is thus absolutely no basis for the contention that, because this action arises under a Federal statute, all the principles of decision *other than those having to do with the interpretation and application of the statute,* should not

be derived from the law of the State. Congress has not itself provided any period of limitation for actions to enforce the liability created by 12 U. S. Code § 812. Thus no Federal question is raised by a period of limitation for enforcement of the liability or by a rule of law which, applying the State statute strictly, eliminates the substantive equitable considerations comprised in the doctrine of laches. So far as concerns any suggestion of interference with a Federal statute by State legislation, the point here presented under the Farm Loan Act is exactly the point presented by the operation of the statute on the liability under the National Banking Act, as to which this Court said in *Platt* v. *Wilmot,* 193 U. S. 602, 610:

> "The substance of the legislation is that when suits are brought in the State of New York to enforce therein the liabilities of directors or stockholders, the statute of limitation enacted by the legislature of that State in regard to directors or stockholders of domestic corporations shall also apply to directors or stockholders of foreign corporations. This is what the legislature has done and this is what it had the right to do.
>
> "The Federal courts, sitting in the State, will, in cases brought therein, enforce the state statute of limitations in actions of this nature."

Since the statute of limitations does not impinge upon the Federally created liability but merely cuts off enforcement thereof, there is applicable here the language used by this Court with reference to limitation of liability under a State statute in *Fourth National Bank* v. *Francklyn,* 120 U. S. 747, 756:

> "Pursuant to these principles, this court has repeatedly held, not only that suits, either at law or in

> equity, in the Circuit Court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the State; *Terry* v. *Tubman*, 92 U. S. 156; *Carrol* v. *Green*, 92 U. S. 509; *Terry* v. *Anderson*, 95 U. S. 628; but also that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the State."[12]

Under this rule, a Federal statute like that here involved will, by its origin, confer upon the Federal courts the right of determination of jurisdiction as between law and equity,[13] but can have no effect upon the limitation of the remedy by lapse of time where it does not itself provide a special remedy and fixes no limitation. We cannot follow the statement at pages 19-20 of respondents' brief that the Farm Loan Act contains provision for a "special remedy", since the asserted remedy is merely the standard bill in equity; nor the further statement that the asserted provision of a remedy by Federal law necessarily imports into the case the doctrine of laches, since laches is no part of the statute and no part of any special remedy prescribed

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[12]To repeat, this is not a case in which the Federal statute creating the liability has coupled with it "a provision for a special remedy", like the Alabama statute referred to in *Pollard* v. *Bailey*, 20 Wall. 520, 527, which is quoted in *Fourth National Bank* v. *Francklyn*, 120 U. S. at 756. Respondents seem to us obviously in error in relying upon this language (brief pp. 56-7) for "the proposition that in interpreting an Act of Congress the Federal court in equity will apply its own rule of limitation . . ."; since the barring of the remedy by lapse of time involves no interpretation of this Act of Congress, and laches is not a "rule of limitation."

[13]Cf. *Atlas Life Insurance Co.* v. *Southern*, 83 L. Ed. 755, 759.

by the statute, but merely a principle of equity jurisprudence now superseded by the State law on the subject.

It follows from what has been said that respondents, in our view, misstate the case when they say it "necessarily involves the interpretation and application of . . . an Act of Congress" (brief, p. 18). The question of laches and limitations involves nothing of the kind. Respondents' implied argument may be that in every case arising under a Federal statute, even questions of substantive law not connected with the statute must be determined by the Federal court in an independent exercise of its jurisdiction, free from any requirement of conformity to the substantive law of the forum. If this were true, the result would be to restore *Swift* v. *Tyson* on a smaller scale; the common law in the Federal courts would be the law of the respective States, except where jurisdiction rested upon a law of the United States; and in cases within that exception, however trifling the connection between the Federal law and the substantive law questions presented, the Federal courts would develop and apply an independent Federal common law, which might be the same as or might differ to any extent from the common law of the forum on the same questions. Such a rule, if it were unhappily to be invented, would be a fertile source of confusion.[14]

However this Court has already indicated that such will not be the rule. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, affirming 95 F. (2d) 671 and 97 F. (2d) 249. In this case an action brought on a note in a State court of Texas by a national bank became amenable to Federal jurisdiction by a cross-petition filed therein for

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[14]To that extent the reassurance given the bar in the *Ruhlin* case, 304 U. S. at 208-9, would be illusory.

winding up the bank, and was removed to the Federal court. The Circuit Court of Appeals noted a special basis of Federal jurisdiction in 28 U. S. C. A. § 41 (16), 95 F. (2d) at 674. Although jurisdiction arose under a law of the United States the main questions related to the powers of a trustee in respect of his trust and to the liability of a bank for the general deposit of trust funds, viz. common law questions dissociated from the interpretation or application of the Federal statute. The Circuit Court of Appeals first decided these questions as matters of general law, 95 F. (2d) at 675, and later after the decision in the *Erie* case reconsidered them under the law of Texas, 97 F. (2d) 249. This Court approved its procedure, stating (306 U. S. at 107):

> "In departing from the 'law of the case', as announced by the state court, and applying a different rule, the court below correctly stated that by reason of the removal it had been substituted for the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court. *Erie Railroad Co.* v. *Tompkins, supra.*

(d) Respondents' other suggested restrictions of *Erie* and *Ruhlin* doctrine.

Throughout their brief respondents recur to the suggestion that the *Erie* and *Ruhlin* cases deal only with matters of "common law" as if to differentiate equity jurisprudence which in one sense, of course, is not common law. There can be nothing in any such distinction if it is at-

tempted to be made. The positive holding in the *Ruhlin* case, 304 U. S. at 205, determines that the substantive law in a controversy not governed by the Federal Constitution, statutes or treaties, is to be supplied even in equity by State statutes and decisions, apart from inter-state controversies upon which the law of neither can be conclusive. *Hinderlider* v. *La Plata River and Cherry Creek Ditch Co.*, 304 U. S. 92, 110. On matters disconnected with the interpretation and application of the Federal Constitution, statutes or treaties, the defect of power in the Federal courts for creation of substantive law appears in the equity quite as fully as in the common law jurisdiction. Cf. 304 U. S. at 78. It is patent that the words "common law" are used throughout the opinion in the *Erie* case in a generic, not in a restrictive sense. See the language of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372. The lower Federal courts have understood the *Ruhlin* case to mean what it says, with respect to the application of State substantive law in equity. *Schram* v. *Poole*, 97 F. (2d) 566, 571 (C. C. A. 9), arising under the National Banking Act; *Bruun* v. *Hanson*, 103 F. (2d) 685, 696 (C. C. A. 9).

Again as a means of protecting the Federal equity jurisprudence from the *Erie* doctrine, respondents invoke the direction of Congress as to procedure in equity, § 2 of the Judiciary Act of 1789, 28 U. S. § 723.[15] By its terms this provision can have nothing to do with the doctrine of laches as substantive law. It is limited to "The forms of mesne process and the forms and modes of proceeding in suits of equity." If our argument is right as to the substantive character of laches, it is certainly not either a form of mesne process or a form or mode of proceeding. To say (respondents' brief, p. 22) that this provision

[15] Quoted in respondents' brief, appendix page xiv.

> "specifically requires the District Court to adopt 'the principles, rules and usages which belong to courts of equity' "

is a misstatement of the statute, since it does not require the adoption of those principles, rules and usages, but provides merely that the forms of process, etc., shall be *according* to those principles, rules and usages.

The equity rules from time to time promulgated by this Court under the permission of § 723 have never made provision for laches as a mode of proceeding, undoubtedly for the reason that it is substantive law. Nor do the new Federal Rules of Civil Procedure, effective September 16, 1938, make such provision.[16]

5. As to Whether the Appropriate Bar in New York Equity Jurisprudence Is the Three or Ten-Year Statute of Limitations.

In addition to contending that the *Ruhlin* case does not require the application of New York law on the question of laches, respondents also contend (brief pp. 28-42) that the New York law, if germane, would apply to this action the ten-year statute as being the so-called equitable statute in New York. This contention now appears for the first time in the present action (respondents' brief p. 7n). The present occasion is also, so far as we are aware, the first upon which any such contention has been made in an action to enforce in New York the statutory liability of stockholders of a monied corporation or banking association.

[16] It may be noted that Rule 8(c), describing defenses required to be pleaded affirmatively, designates laches as well as limitations. There is, of course, no indication as to what the content of either defense should be, and the enumeration of the two was required by the fact that the new Rules unify procedure in law and in equity.

(a) Clarity of the Statute Involved.

The novelty of the argument advanced by respondents on behalf of the ten-year statute for this type of case is doubtless due to the very clear language of the New York legislation on the subject, which is so specific and unmistakable as to have discouraged any such attempt in the past. As has already been pointed out in our main brief, the New York statute invoked by petitioners, Civil Practice Act, § 49, subd. 4[17] expressly bars by three years .

> "an action against a . . . stockholder of a . . . banking association . . . to enforce a liability created . . . by statute . . ."

The liability created by 12 U. S. Code § 812, whether legal, equitable, or of concurrent jurisdiction, could not be more aptly or exactly described. The result is a specific statute fixing the time within which suit must be brought on a cause of action described with particularity. On the other hand, the ten-year or so-called equitable statute, Civil Practice Act § 53, excludes the foregoing and other specific prescriptions from its scope, and establishes the ten-year period for actions other than actions against a stockholder of a banking association to enforce a liability created by statute, in the following words:

> "Limitation where none specially prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Language could not be plainer. To argue, as do respondents, that the New York legislature did not really mean to bar this action by three years, but meant to bar

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[17]Quoted at page 3 of our main brief.

it by ten years, is to argue that the legislature did not understand the English language.

(b) Actual decisions on the Point.

Respondents appear to be correct in saying (brief, p. 30) that no action has ever been brought in New York to enforce a stockholder's liability created by a statute "similar to the one in the case at bar, interpreted as it has been by this Court"; for this phrase excludes both statutes not containing the words "equally and ratably", and statutes, like the National Banking Act, which permit a receiver or other representative to sue for all creditors.

Nevertheless, it is of the greatest significance that every court in New York which has considered limitations in connection with an action to enforce the liability of a stockholder of a banking association has deemed the three-year period the only one applicable. See, in addition to the cases cited at pages 9-10 of our main brief, *Bankson* v. *Anderson,* 21 F. Supp. 67, 69; *U. S.* v. *Arthur,* 23 F. Supp. 537, 539; *Holmberg* v. *Anchell,* 24 Fed. Supp. 594, 601; and the decisions in the instant case, both in the District Court, R. 35, and in the Circuit Court of Appeals, R. 423.[18]

In our main brief we have called attention to the fact that two of the New York cases cited, which applied the New York statute, were representative actions in equity by creditors. *Wright* v. *Russell,* 269 N. Y. 683, denying leave to appeal from 245 A. D. 708, 155 Misc. 877; *Reis-*

[18]Most of these decisions deemed the causes of action exclusively equitable on the basis of the dictum of this Court in *Christopher* v. *Brusselback,* 302 U. S. at 502, but nevertheless agreed that the statute of limitations to be followed, at least by analogy, was the three-year statute, not the ten-year statute. The three authorities cited by respondents (brief, p. 35) are discussed hereinafter at pp. 37-9.

man v. *Hall*, 257 A. D. 892. Respondents insist that these decisions are not comparable with the instant case because the liability arose under the Constitution of Illinois, which contained no "equal and ratable" requirement, and, as construed by the Illinois courts, permitted an action at law as well as an action in equity to enforce the liability (brief, p. 31). However, the actions were framed in equity, and the ground of decision was not concurrent jurisdiction, but the literal application of the statute regardless of the form of the action or the nature of the remedy. As was said by the lower court in *Wright* v. *Russell*, 155 Misc. at 877-8 (affirmed without opinion),

> "Assuming that this provision of this State [Illinois] Constitution creates a liability technically distinct from either statute or common-law liability, it would seem, nevertheless, that this kind of liability comes within the meaning of this section of the Civil Practice Act."[19]

In those two cases, whether or not a receiver or other statutory representative could have sued, the action before the New York court was a representative action in equity, subject in all respects to the same argument which respondents make here, except for the absence of the words "equally and ratably" or their equivalent in the statute creating the liability. The presence of those words in the Farm Loan Act is seized upon by respondents as a differentiating circumstance. Whatever effect may be given those words by this Court in the interpretation of a Federal statute, we

[19]Cf. *Hobbs* v. *National Bank of Commerce*, 96 Fed. 396 399: "Its terms are now so broad as to include every class of liabilities of stockholders of moneyed corporations . . ."

wish to point out that *so far as the New York law of limitations is concerned,* those words make no difference whatever; even if the conception of equal and ratable liability made this a purely equitable action, the action is still barred by the three-year statute which embraces in its terms the liability imposed. So much is clear from the discussion of the three-year statute by the New York Court of Appeals in *Brinckerhoff* v. *Bostwick,* 99 N. Y. 185. In this case, passing upon an earlier form of Civil Practice Act § 49 subd. 4, and holding that in that form the limitation covered only liabilities created by statute, not liabilities created by common law,[20] the Court of Appeals stated the legislative history of the phrase then in the statute "liability created by law", and concluded that it covered only statutory liability. This history appears at pages 191-2, where among other statutes imposing liabilities barred by the three-year period, the court mentioned Laws of 1882, Ch. 409. Now this statute contained an "equally and ratably" clause similar to that in the Farm Loan Act. It provided in part as follows:

> "§ 125. Whenever default shall be made in the payment of any debt or liability contracted by any corporation or joint-stock association, for banking purposes, issuing bank-notes or any kind of paper credits to circulate as money, the stockholders of such corporation or association shall be individually responsible, *equally and ratably,* such responsibility

[20]The amendment to the present form "liability created by the common law or by statute" was effected by Laws of 1897, Ch. 281. The history of the statute as given in *Brinckerhoff* v. *Bostwick* was made the basis of the decisions in *Hobbs* v. *National Bank of Commerce,* 96 Fed. 396 and *Platt* v. *Wilmot,* 193 U. S. 602.

> to be enforced as hereinafter provided and in no other manner, for the amount of such debt or liability, with interest, to the extent of their respective shares of stock in any such corporation or association, as hereinafter provided." (Italics supplied.)

The holding of the Court of Appeals on this language would seem to be decisive of any contention that, as a matter of New York law, the words "equally and ratably" or their equivalent took the statutory liability into equity and removed it from the scope of Civil Practice Act § 49 subd. 4. The same Court held in an action to enforce stockholders' liability under the New York Banking Law, construed to impose an equal and ratable liability, that, the right of action being statutory, the remedy is the same in equity as at law. *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530. In *Nettles* v. *Childs*, 281 N. Y. Mem. Op. 60, affirmed 255 A. D. 849, the plaintiff, a receiver under South Carolina law of the stockholders' liability of a South Carolina bank, asserted that he had no adequate remedy at law and claimed various equitable relief.[21] He argued that the action was in the nature of a judgment-creditor's bill and therefore entitled to the benefit of the ten-year statute. This argument was rejected at Special Term by Mr. Justice Shientag in the following language:

> "The argument that the action is in the nature of a judgment-creditor's bill or an equitable execution, and therefore governed by section 53 of the New York Civil Practice Act, is without merit. It is clear that the action is brought against stockholders to enforce the statutory double liability attaching to the stock of the South Carolina bank."[22]

[21] Papers on appeal at pages 54-5.

[22] Appeal papers, page 99; not officially reported.

(c) Respondents' Claim as to the Ten-Year Statute.

In the utter absence of any precedents indicating as the limitation for actions to enforce stockholders' liability any period other than the three-year period, respondents have constructed an elaborate argument to the effect that the ten-year statute, Civil Practice Act § 53, is the generic limitation clause for all equitable actions whatever (brief, pp. 32-42), supporting this with a historical analysis of the New York ten-year statute (appendix, pp. v-xiii). This argument will now be dealt with *upon the assumption* (which we believe to be incorrect) that the cause of action here asserted is exclusively equitable in the sense intended by respondents, *i.e.* in the sense that it is not susceptible of adequate remedy at law.

The difficulty with respondents' argument on this point is that they conceive "remedy" in the conception of adequate remedy at law, much too narrowly as merely some form of specific relief asked for in a complaint, whereas in reality and in the New York decisions with reference to equitable jurisdiction "remedy" is conceived as the entirety or substance of a cause of action embracing at once the relief sought, the facts giving rise to relief, and the right generated by those facts.

That this is so appears at the outset from respondents' historical statement. It there appears that § 50 of the statutes of 1830 defined the equity jurisdiction in terms of limitations upon the basis of *subject matter* (respondents' brief, appendix pp. i-ii). The ten-year statute was derived from § 52 of the Revised Statutes of 1830, which limited by ten years trusts "not cognizable by the courts of common law" and all other cases not provided for (such as

actions for reformation, cancellation, and the like); this section was comprised in Article Sixth of Vol. II, Revised Statutes, Part III, Chapter IV. With the adoption of the Field Code of 1848-9, all statutes of limitation were rephrased so as to apply to the substance of the action rather than to the form. This rephrasing left the ten-year statute as before, a residual equitable statute. The Revisers' Comment on the ten-year statute as comprised in the Field Code points out (respondents' brief, appendix p. iii) that the effect of the revision is to apply the stated periods of limitation, not to the form of the remedy, but to "the substance of the remedy." This insistence upon the distinction between form and substance with respect to equitable remedies supports our contention that the "remedy" involved in the concept of adequate remedy at law as the prerequisite to equity jurisdiction and a test for the selection of the appropriate period of limitation, embraces the substance and legal nature of the claim asserted, not merely the form in which it is cast. Respondents concede, on the other hand, that their argument for application to this case of the ten-year statute is connected with a purely formal, rather than a substantive, conception of equitable remedy.[23]

Analysis of the New York decisions indicates the same conclusion. In *Hanover Fire Insurance Co.* v. *Morse Dry Dock & Repair Co.*, 270 N. Y. 86, application of the ten-year statute was due not merely to the form of remedy, but to the absence of any right at law equivalent to the right of reformation of the contract on the ground of fraud. In *Rundle* v. *Allison*, 34 N. Y. 180, the plaintiff could not have sued herself at law at all and her only right existed in

[23] Respondents' brief, page 23.

equity. The scheme of the New York Practice Act in each case is to apply the period of limitation to specific subject matters described in the statute, despite respondents' contention to the contrary (brief, p. 34n). The determinative factor in every instance is the substance or subject matter of the right asserted.

This is most plainly apparent in *Potter* v. *Walker*, 276 N. Y. 15 (our main brief, pp. 11-12). There, despite the secondary form of the action, the New York court discriminated as to the subject matter between the various claims derivatively asserted, applying the six-year statute to those of legal character and the ten-year statute only to those where the equitable remedy corresponded to a true equitable right as against the defendants. Respondents' account of this case (brief, appendix pp. xi-xiii) while correctly stating that it applies the ten-year statute where the legal remedy is inadequate or absent, quite fails to observe the distinction there sharply drawn by the Court of Appeals between "remedy" as form and "remedy" as substance.[24]

Many other decisions of the New York Court of Appeals, however, enforce the distinction between substance and procedure in equity in selecting the appropriate statute of limitations, giving the benefit of the ten-year period only to actions enforcing a true or substantive equitable right and disregarding form in that determination. Without extending this brief by discussion of them, we here only refer to *Shepard* v. *Taylor Pub. Co.*, 234 N. Y. 465 (creditor's suit to set aside a chattel mortgage and compel an

[24]We again draw attention to the excellent statement of this distinction by Lurton, *J.* in *Wallace* v. *Lincoln Savings Bank*, 89 Tenn. 630, 648-9, which the Court of Appeals followed.

accounting of proceeds of foreclosure of mortgage barred by six years in view of statutory basis of liability); *Schram* v. *Cotton*, 281 N. Y. 499 (liability of stockholder of a holding company which owned bank stock barred by three years, despite contractual nature of primary liability); *Butler* v. *Johnson*, 111 N. Y. 204 (enjoining the executrix of a will from selling lands to pay debts and a legacy held barred by the six-year statute) *Mason* v. *Henry*, 152 N. Y. 529 (suit by receiver in equity barred by six years); *Borst* v. *Corey*, 15 N. Y. 505, and *Plet* v. *Willson*, 134 N. Y. 139 (suit by unpaid vendor of land to foreclose and obtain payment barred by six years); *Diefenthaler* v. *Mayor*, 111 N. Y. 331 (suits to vacate assessment and recover taxes barred by six years); *Welles* v. *Yates*, 44 N. Y. 525, 534 (accounting for timber cut as part of equitable action to reform a deed barred by six years); *Brick* v. *Cohn-Hall-Marx Co.*, 276 N. Y. 259, 264 (action on contract framed as an action for fraud, construed on the former theory in accordance with the reality and the essence of the action for the purpose of limitations).

Perhaps the most instructive of these cases in connection with the present controversy is the latest decision of the Court of Appeals in *Schram* v. *Cotton*, rendered November 21, 1939, and applying the three-year statute to a national bank stockholder's liability despite the fact that the plaintiff claimed the benefit of the six-year statute by virtue of the *form* of the liability asserted, which arose through defendant's stock in a holding company and which therefore allowed the plaintiff to claim that the liability was contractual rather than statutory. The Court by Mr. Justice Lehman first applied the three-year statute in accordance with its terms (p. 503):

> "The statutory period of limitation of this State is applicable in an action brought here to enforce the individual liability of the stockholders of a national bank for the debts of the bank in accordance with the acts of Congress which create and regulate such liability, since no other period of limitation is prescribed by these acts. (*Pufahl* v. *Estate of Parks*, 299 U. S. 217.)"

Dealing with the claim that the *form* of the liability asserted should determine the applicable period of limitation, Lehman, *J.*, said at page 507:

> "To hold that the action to enforce the statutory liability imposed upon stockholders of the bank, which has been expressly assumed by the stockholders of the dominant corporation, is governed by a different Statute of Limitation from that which governs an action to enforce the statutory liability impliedly assumed by the stockholders of the bank when they acquire their stock, would exalt form over substance. The problem concerns less the construction of the contract of the defendant than the construction of the New York statute, and in the solution of that problem the decisions of the courts of Michigan and of the Federal court furnish little help."

In support of the claimed application of the ten-year statute here, respondents cite (brief, pp. 35-8) only three cases. *Mencher* v. *Richards*, 256 A. D. 280, has already been referred to (main brief, pp. 12-13). It should be emphasized that the actual holding deals, not with the statutory liability of directors and stockholders *as such*, but with the asserted liability of directors of a corporation to account

in equity for alleged unlawful profits. The obligation to account for property received in trust is an ancient head of equity jurisdiction, and is of course accorded the ten-year period of limitations by *Potter* v. *Walker*, 276 N. Y. 15, 25-6. The language of the Appellate Division, Second Department, quoted by respondents, in so far as it goes beyond this holding is dictum and is unsound.[25]

Richards v. *Gill*, 138 A. D. 75 (respondents' brief, pp. 35-6) applied the ten-year statute to an action against a devisee and executrix to enforce a bank stockholder's statutory liability established by a judgment obtained against the decedent in an action instituted within the three years provided by Code of Civil Procedure § 394, now Civil Practice Act, § 49 subd. 4 (138 A. D. at 77). The cause of action was deemed to be equitable because it did not arise as against the defendant devisee until the death of the stockholder and the probate of his will. The court took pains to point out, 138 A. D. at 79, that the devisee was not entitled to the same statute of limitations as would have applied to the stockholder. The case thus has no bearing here.

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[25] As is pointed out in *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 88: "The language of any opinion must be confined to the facts before the Court. No opinion is an authority beyond the point actually decided, and no judge can write freely if every sentence is to be taken as a rule of law separate from its association." It is of interest to note that the Appellate Division, Second Department, had previously made an erroneous decision in a derivative action and applied the ten-year statute to legal causes of action asserted by a minority stockholder. *Chance* v. *Guaranty Trust Co.*, 251 A. D. 855, leave to appeal to the Court of Appeals denied in 252 A. D. 762, but acknowledged to be error in *Chance* v. *Guaranty Trust Co.*, 256 A. D. 840, 841.

The authority of the case is questioned in *Richards* v. *Carpenter* (C. C. A. 6), 261 Fed. 724, 731, on account of the later case of *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530, holding that an action to enforce stockholders' liability lies at law as well as in equity.

Respondents' third case, *Hanna* v. *Peoples National Bank*, 179 N. Y. 107 (brief, p. 35), is even more conspicuously inapplicable. The Court of Appeals did not deal with the statute of limitations at all, did not affirm the decision below, but directed a new trial. The opinion of the Special Term, 35 Misc. 517, 523, which respondents quote, clearly discloses error in applying the ten-year statute when the six-year statute was alone applicable, as is now settled by *Potter* v. *Walker*. The action was by a minority stockholder for the negligence of directors. The sufficiency of the six-year statute as a defense against such cause of action, by virtue of its substance, is shown by *Potter* v. *Walker*, 276 N. Y. at 26. The Special Term, however, erroneously emphasized the "form of the action" (p. 519) and in support of the ten-year statute as the appropriate period cited (p. 523) *Brinckerhoff* v. *Bostwick*, 99 N. Y. 185. The latter case is overruled on the point by *Potter* v. *Walker*.

Reliance upon such authority by respondents in defense of the claimed application here of the ten-year statute of limitations, we regard as tantamount to confession of error.

As a further conclusive indication that Civil Practice Act § 49 subd. 4 has always been intended by the New York legislature to be an all-inclusive bar in respect of the statutory liability of stockholders of moneyed corporations, we may finally refer to the original form of this statute in the Revised Statutes of 1830, quoted by this Court in *Platt*

v. Wilmot, 193 U. S. at 608. The original section excluded from any possible application to such liability all other provisions of the chapter of the Revised Statutes relating to the times of commencement of actions, as follows:

> "None of the provisions of this chapter shall apply to suits against directors or stockholders of any monied corporations, to recover any penalty or forfeiture imposed, or to enforce any liability created, by the second title of the eighteenth chapter of the first part of the Revised Statutes . . . "

(d) Application of the New York law to facts here presented.

To sum up, analysis of all the authorities submitted by respondents fails to disclose any reason why, under the circumstances of this case, the three-year bar of Civil Practice Act § 49, should not, in accordance with its unmistakable terms, govern the action. Under the law of New York, situations in which the proportionate liability of stockholders had to be ascertained before any judgment could be rendered, must be distinguished and set aside.[26] In the instant case, no accounting was needed at the inception of the action. More than three years before the action was instituted, it had been determined that the Ohio Joint Stock Land Bank was insolvent by more than its outstanding capital stock (R. 341, 371; cf. R. 370, finding that plaintiffs did not know at the commencement

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[26] *Marshall* v. *Sherman*, 148 N. Y. 9, 22 (respondents' brief p. 42) was a case in which an accounting in equity was required because the liability of the stockholders was indeterminate. It is important to note that this case in no way involved the statute of limitations.

of the action that the deficiency would be "more than" the outstanding stock). Indeed, the respondents alleged in their original bill (R 6):

> "On information and belief the amounts now due and owing by said Land Bank to plaintiff and other creditors on whose behalf plaintiff sues exceed the total par value of said Land Bank's stock."

The defendants in the action so instituted, petitioners here, were all the stockholders within the jurisdiction of the court (R 369). As regards the statutory liability of petitioners, therefore, any accounting for the purpose of establishing their ratable share of the debts was pure supererogation and could not possibly give rise to a right in equity. The defendants in their answer admitted their liability in full (R 16, 25), just as they admitted the insolvency of Ohio Joint Stock Land Bank (R 16 and 45, 24 and 57, referring to R 5). Further, they pleaded the extent of the deficiency as a special defense (R 48, 59) so as fully to protect their rights under the statute of limitations.

The nature of the claim against petitioners, therefore, was not in doubt. It was a pure money claim in respect of which no accounting or other equitable machinery was requisite and in respect of which no equitable right arose. The need for accounting as among the plaintiffs, if any such existed, could not properly affect the nature of the claim against the defendants with respect to the jurisdiction of equity, as Judge Clark pointed out (R. 432). In fact an accounting among the plaintiffs was not necessary: under Civil Practice Act § 195 any creditor could have maintained a representative ation at law on behalf of the

class, and the proceeds of any recovery could either have been paid into court, as the basis of a separate administration *in rem*, or remitted direct to the receiver in Indiana (R. 366) for administration as part of the assets of the estate. It follows that the machinery of equity accounting as among the creditors is a superfluity quite irrelevant to the question whether the creditors had an adequate remedy at law *as against the stockholders.*

So far as the New York law is concerned, this point is set at rest by *Cwerdinski* v. *Bent*, 256 A. D. 612, affirmed without opinion by the Court of Appeals November 14, 1939 (not yet officially reported), where the Court rejected the claimed necessity of an accounting in applying the six- rather than the ten-year limitation to a minority stockholder's suit in the right of the corporation to recover from directors alleged excessive bonuses. In support of his contention that the remedy at law was not adequate, plaintiff urged that an accounting was needed *as between the defendants and the corporation* whose right he asserted,[27] and the Special Term so held.[28] The point was that an accounting of the earnings of the corporation would be needed to verify the calculation of bonuses. Rejecting this claim the court pointed out that the corporation could have sued for money had and received, in which no accounting would have been necessary, and that the stockholder is in no better position than the corporation, even though the complaint is addressed to the equity side of the court (256 A. D. at 615).

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[27] Respondents' brief, pp. 9, 19-20.

[28] New York Law Journal, December 13, 1938; papers on appeal, at p. 42 (not officially reported).

To sum up, we repeat that respondents fail to differentiate, so far as regards the New York statute of limitations, the rule of *Potter* v. *Walker*. Granted that the receiver of a joint stock land bank cannot enforce the liability of stockholders and that a representative action is therefore necessary,[29] the case in no way differs from the other type of secondary action represented by *Potter* v. *Walker*. There also the entity whose right is asserted by the plaintiff, viz. the corporation, cannot sue, because it is alleged as an essential element of equity jurisdiction that the defendants are wrongfully in control of the corporation. Granted that in the one case the corporation could theoretically sue, while in the other case the insolvent corporation never institutes the suit but its insolvency is a condition of the accrual of the liability; still the right asserted is derived through the corporation and is asserted on behalf of another kind of *universitas juris*, viz. the body of creditors claiming through the corporation, and the kind and substance of the claim is a debt cognizable at common law from the earliest days of its jurisdiction.

We conclude that beyond any reasonable possibility of doubt the New York three-year statute bars this claim, if under the *Erie* and *Ruhlin* doctrine that law is applicable here. It must be noted that in any event the petitioner Russell, entitled under New York Civil Practice Act § 55 (our main brief p. 4) to the benefit of the California law as being a California resident (R. 365), has a specific finding to the effect that the California statute of limitations is three years (R. 355).

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[29] *Wheeler* v. *Greene*, 280 U. S. 49.

6. As to Concurrent Jurisdiction at Law and in Equity.

Even though we were wrong in all the foregoing argument, and even though this case is to be determined upon settled principles of Federal equity jurisprudence as existing prior to the *Erie* and *Ruhlin* cases, this Court will of course apply the statute of limitations at law if the jurisdiction of law and equity is concurrent. The statute of limitations at law is conceded by respondents in such case to be the three-year statute.[30] Should the jurisdiction be concurrent, equity will follow the statute of limitations at law as a matter of obedience rather than by analogy only.[31]

In the determination whether the jurisdiction is truly concurrent, respondents again insist that the only test is whether the remedy at law is adequate. To this test there is no objection if, as before, it be understood that the word "remedy" embraces more than the mere relief (colorable or not) prayed in the bill, and goes to the nature and substance of the claim.

On that subject all that has been said above with respect to the New York law is here applicable as a matter of

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[30]It is our contention, of course, that Civil Practice Act § 49 bars actions of the kind described in equity as well as at law, but it is in any event common ground that that statute applies at law.

[31]Respondents are in error in saying (brief, pp. 26-7) that equity follows the law only by analogy where jurisdiction is concurrent, and that where equitable jurisdiction is exclusive for want of legal remedy, there is no analogy to follow. See in addition to the cases cited at p. 22 of our main brief, *Hall* v. *Law*, 102 U. S. 461, 466; *Stearns* v. *Page*, 48 U. S. 819, 829; *Metropolitan Bank* v. *St. Louis Dispatch Co.*, 149 U. S. 436, 448.

general law if this Court shall not here apply the rule of the *Erie* and *Ruhlin* cases. Other authorities establishing this distinction between form and substance, as a matter of general law, are cited at page 28 of our main brief. See also *Torgeson* v. *Department of Trade & Commerce*, 127 Neb. 49, 55-6; *Winston* v. *Gordon*, 115 Va. 899, 913; *Boyd* v. *Mutual Fire Assn.*, 116 Wis. 155, 181.

With reference to the determination of the essential character of the right here sought to be enforced as against the petitioners, what has been said above under the head of New York law is again applicable. The right asserted is primarily and in its essential quality a right cognizable at law. No accounting or judgment of insolvency is needed as against the defendants. A representative action under New York Civil Practice Act § 195 would have served every necessity of the respondents except the necessity of turning the defense of limitations.[32] Upon appropriate facts it is clear that an action to enforce stockholders' liability lies at law even under a statute contemplating equal and ratable liability. *Mosler Safe Co.* v. *Guardian Trust Co.*, 208 N. Y. 524, 530.

Against this reasoning respondents' principal argument here, and their decisive argument below, was *Christopher* v. *Brusselback*, 302 U. S. 500; *Wheeler* v. *Greene*, 280 U. S.

[32]The two New York cases cited by respondents in this connection are not conclusive. In *Marshall* v. *Sherman*, 148 N. Y. 9, 22, it appeared that the liability of the stockholders had not been determined. *Hirshfeld* v. *Fitzgerald*, 157 N. Y. 166, merely quoted the language of the former case and went off on another point; also it appears from the appeal papers therein that the liability of the stockholders was not determinative at the commencement of the action. Neither case involved the statute of limitations.

49; and *Brusselback* v. *Cago Corp.*, 85 F. (2d) 20, certiorari denied 299 U. S. 586.

As respects the *Cago* case, we are frank to say that we believe it was wrongly decided, and that the decision of the District Court dismissing the action because of the existence of an adequate remedy at law, 14 F. Supp. 993, was correct. The conclusion of the Second Circuit Court of Appeals may perhaps be explained by the complexity of the facts (85 F. [2d] at 22) which sharply differ from the simple picture presented in the instant case of creditors claiming an unpaid balance of $4800 (R. 368) against defendants holding stock of a par value of $31,250 (R. 370). While complexity of the facts is a ground for equity jurisdiction, it must be real and substantial for that purpose. *Fowle* v. *Lawrason*, 5 Peters, 495, 503; *Curriden* v. *Middleton*, 232 U. S. 633, 636; *Investors' Guaranty Corp.* v. *Luikart*, 5 F. (2d) 793, 796; *Randolph* v. *Tandy*, 98 Fed. 939, 940. Equitable jurisdiction resting upon the mere complexity of accounts is not exclusive and can be no more than concurrent with jurisdiction at law.

Certain it is, in any event, that respondents are wrong in treating the denial of certiorari by this Court as a determination on the merits.[34] It is perfectly well settled that the denial of certiorari intimates no expression of opinion

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[34]Brief p. 30, "this Court by its action obviously held in the *Cago* case"; p. 52, "wherein this Court rejected the argument now again advanced." Of recent memory is the instance where this Court reached a result, *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247, diametrically opposite to a decision of the Second Circuit Court of Appeals on substantially the same facts, *Anglo-Continentale Treuhand A. G.* v. *St. Louis Southwestern R. Co.*, 81 F. (2d) 11, as to which this Court denied certiorari in 298 U. S. 655.

on the merits. *United States* v. *Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258; *Atlantic Coast Line Railroad Co.* v. *Powe*, 283 U. S. 401, 403-404. The denial of certiorari was doubtless due to the fact that this Court deemed it of little importance whether the *Cago* case proceeded at law or in equity.

As regards *Christopher* v. *Brusselback* and *Wheeler* v. *Greene*, we have already stated our views (main brief, p. 27). The dictum in *Christopher* v. *Brusselback* was not uttered with reference to any particular state of facts, much less with reference to code remedies like New York Civil Practice Act § 195, which permit a representative suit at law. *Wheeler* v. *Greene* predicated its statement that equity furnished the usual proceeding and most likely way for enforcement of stockholders' liability upon the further statement that in equity (p. 51) "the assessment instead of one hundred per cent can be adjusted to the specific case." That basis of equity jurisdiction is, of course, absent in the instant case, where no such adjustment was ever needed. The same may be said of every case in this Court, of which we are aware, sustaining a bill in equity as the proper method for enforcement of stockholders' liability. In all it appears that the deficiency either was not ascertained at the inception of the suit or was ascertained to be less than the aggregate of stock outstanding. See *Pollard* v. *Bailey*, 20 Wall. 520, 522, 524 ($700,000 of debts against $900,000 of stock); *Terry* v. *Little*, 101 U. S. 216, 217 (debts of "several hundred thousand dollars" against $400,000 of stock; *held* that each stockholder shall pay only "his just proportion of any fund that may be required to discharge the outstanding obligations"); *Richmond* v. *Irons*, 121

U. S. 27, 48 (more than $262,000 of debts against $500,000 of stock; *held* that the proceeding must "enable the court to ascertain for what the stockholders ought to be made liable"). In these cases, which were decided between 1873 and 1887, there was no suggestion of the availability in the procedure under which the bill was filed, of any device for permitting representative suits at law as under New York Civil Practice Act § 195. The want of such a device to make the remedy at law adequate particularly appears from the opinion in *Terry* v. *Little; cf.* the emphasis laid upon it by Judge Clark in the instant case (R. 433).

There remains as the only case in which this Court appears to have given full consideration to facts comparable to those here present, under a comparable statute (although not a Federal statute), *Carrol* v. *Green*, 92 U. S. 509 (1875) (our main brief pp. 30-1). Here the judgment of the Court was based exclusively upon the defense of limitations (p. 510). The analysis of the nature of the claim arising under the statute, as a result of which the Court concluded that the defense of limitations applied in equity (p. 516) even though suit could not be brought at law (pp. 512-3), goes to the nature and substance of the asserted liability, in exactly the manner for which we have contended here.

With respect to this case all respondents are able to say (brief, p. 56) is that it arose by virtue of diversity of citizenship, a distinction which we have above shown to be without substance (pp. 21-3 hereof); that its authority is impugned by the fact that it was not cited in a later case; and that part of the language on which we rely was dictum and not good law. These criticisms require no answer from us.

Conclusion

The decision below is erroneous for failure to give effect to the New York three-year statute of limitations, by virtue both of the *Erie* and *Ruhlin* doctrine and of the concurrent jurisdiction of equity.

Respectfully submitted,

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New York, January 16, 1940.